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Supreme Court of the United States

No. 475. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
BERWIND-WHITE COAL MINING COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

December 18, 1939.

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Supreme Court of the United States

No. 475. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
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against
BERWIND-WHITE COAL MINING COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER.

A writ of certiorari was granted by this Court on December 4, 1939, to review a final order of the Court of Appeals, affirming (one Judge dissenting) a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department nullifying the petitioner's determination that certain sales taxes were due and owing to him as Comptroller of the City of New York. The amount of the tax in controversy is $176,703.89, with interest, and the period embraced is December 10, 1934 to December 31, 1935 (R. 151).

The Court of Appeals nullified the petitioner's determination upon the sole ground that to require the respondent to collect the sales tax from its New York customers on their local purchases for consumption of coal shipped from Pennsylvania, was violative of the Commerce Clause (Art. I, Sec. 8, Cl. 3).

Opinions Below.

The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 150), before which the proceedings to review the Comptroller's determination were heard in the first instance (New York Civil Practice Act, Art. 78), is reported in 255 App. Div. 961 (1938). The Court of Appeals wrote no opinion, but said:

> "Order affirmed with costs; no opinion." (281 N. Y. mem. 34, 22 N. E. (2d) 173 [1939]).

In a supplemental memorandum on motion for reargument or amendment of the remittitur, the Court of Appeals added to the foregoing memorandum the words (R. 158):

> "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. 1, sec. 8, cl. 3) of the Constitution of the United States." (281 N. Y. mem. 94, 22 N. E. (2d) 764 [1939]).

Jurisdiction.

The writ of certiorari was issued pursuant to the power conferred upon this Court by U. S. Code, Title 28, §344, subsec. b. The decision below having sustained the claimed federal right, and the federal question being the sole ground of the decision, a case was made out within the cited statute for this Court to issue the writ.

Statement of the Case.

The respondent, to whom we shall generally refer as the "taxpayer", is a Pennsylvania corporation engaged in the marketing and distribution of bituminous coal from its own mines in Pennsylvania, and from the mines of others in West Virginia (R. 27-28, 106).

The only question here involved relates to sales of coal mined by the taxpayer in its Pennsylvania mines and delivered in New York City to local consumers.

Of the taxpayer's New York sales during the period in question (December 10, 1934 to December 31, 1935), 96%, or a total of $7,239,879.36 out of $7,537,940.09, represented purchases by local public utilities for local use in the generation of power (Taxpayer's Exhibit 4, R. 109). The other 4% of the taxpayer's sales, amounting to $298,160.73, was divided among 15 industrial and miscellaneous companies (*Ibid.*).

Although the taxpayer's sources of supply are out of the State, it has established its financial and sales headquarters in New York City (R. 100). Its President and two out of its three Vice-Presidents are permanently stationed there (R. 100-101). Its foreign and bunkering departments, its general sales department, its accounting department and research division are all maintained in offices in New York City (*Ibid.*).

All of the taxpayer's contracts are negotiated, executed and signed by all parties within the City of New York (R. 76). In no case does the offer or acceptance occur in Pennsylvania or at any other point outside of the City of New York (*Ibid.*).

However, the taxpayer has never acquired storage facilities within the City (R. 30). Instead, it fulfills its contracts by shipping directly to the customer from the mines (R. 30-33). It is on this method of delivery that the taxpayer chiefly relies for its claim that its sales are constitutionally immune from tax.

All orders for coal are placed in the executive office in New York City and transmitted by that office to Pennsylvania (R. 63). In Pennsylvania the coal is loaded into cars, consigned by the taxpayer to itself, and carried by rail to Hersimus Pier, New Jersey (R. 63-64). The taxpayer transfers the coal to its own barges at Jersey City and brings it to the customers' plants on the river front or alongside ships in New York City (R. 63-65, 108).

It is conceded that both title to and possession of the coal pass to the buyers in New York City, (R. 76).

Payments are generally made in New York City at the taxpayer's executive office (R. 101-102), and "sampling" —a process of comparing shipments with specifications—is always carried on entirely within the City (R. 103-104).

The coal involved is of two grades: B-Seam and C-Prime Seam, representing differences in heat value and chemical composition (R. 28). Other companies produce these types of coal (R. 104-105). Berwind-White coal may be purchased from New York City wholesalers (R. 29), in which case a tax is undeniably payable.

History of the tax at bar.

This tax was first enacted on December 10, 1934, as part of a comprehensive program of tax measures by which New York City was to finance its pressing emer-

gency relief needs on a pay-as-you-go basis.[1] As appears from the Appendix of Statutes to be submitted on the argument, it was enacted pursuant to emergency enabling legislation passed by the State legislature (Laws of 1933, ch. 815 [Appendix C], Laws of 1934, ch. 873 [Appendix B], and amendments and renewals thereof). The enabling act declared that an emergency existed requiring the imposition of taxes "to relieve the people * * * from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare." It authorized the City of New York to "adopt and amend local laws imposing in any such city any tax which the legislature has or would have power and authority to impose." The revenues from the taxes were required to be used exclusively for unemployment relief.

The first tax imposed by the City of New York pursuant to this authorization was a tax on utility companies, measured by their gross receipts (Local Law No. 19 of 1933). The next tax was a general tax on merchants and other businessmen for the privilege of carrying on business in the City, measured by the gross receipts from such business (Local Law No. 9 of 1934). In the main, the measure of this tax consisted of the receipts from sales of goods and services. Both of these taxes have been continued down to date and are the taxes by which the City of New York has placed a portion of the relief tax burden on persons selling tangible personal property or services or doing other business in the City of New York.

It soon became evident that the revenue to be derived from taxing utilities and vendors of goods and

[1] Certain of these measures were before this Court in *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938), where they were sustained as against asserted contravention of the Fourteenth Amendment.

services and other businesses under these levies was inadequate to finance New York City's $70,000,000 emergency relief needs. As a result, the City was obliged to borrow large sums of money for relief purposes and faced a serious financial crisis.

Accordingly, the Municipal Assembly, looking about for other sources of revenue, determined that the $50,000,000 a year necessary to fill up the void, could be raised only by a tax with a broad base upon consumers. Thereby, consumers would bear the main burden of local relief. The intent was that all New York City purchasers would bear the tax.

Having determined to place the burden of local relief on New York City consumers, the Municipal Assembly enacted two tax laws for that purpose: a tax on consumers based upon their local purchases for consumption (Local Law No. 20 of 1934, as amended, printed as Appendix A in the Appendix of Statutes), and a personal property tax designed primarily to pick up extracity purchases (Local Law No. 25 of 1934).

Provisions of the tax law at bar.

The tax imposed by Local Law No. 20 of 1934, as amended, is limited to purchases for consumption. Purchases for resale are exempt under a definition of retail sale having that express purpose (Sec. 1g). A purchaser who has paid the tax and later resold may, upon filing a proper certificate of resale, obtain a refund of the taxes paid (Sec. 14).[1]

[1] Under the business tax law, on the other hand, wholesale as well as retail vendors are taxed.

The sales tax applies with respect to the following kinds of purchaser-consumers (Secs. 2a, b, c and d):

1) Consumers of goods,[1] excluding food and drugs on prescription.

2) Consumers of utility services,[2] *i. e.*, gas, electricity, telephone, etc.

3) Customers in restaurants and cafes where the meals are over $1.[3]

The tax is imposed not on the seller[4] but on the buyer. The statute makes this abundantly clear and the Courts have so held. *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113 (1937); *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293 (1938).

The statute provides that the tax is payable "by the purchaser to the vendor, for and on account of the city of New York" (Sec. 2). The vendor is liable for collection, filing of returns and payment over to the City and has "the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser as if the tax were a part of the purchase price of the property or service" (Sec. 2). The vendor is required to state and charge the tax separately from the sales price (Sec. 2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties. It is also a crime for the vendor to advertise that he is absorbing the tax (Secs. 2, 15). Where the vendor fails to collect the tax, the purchaser-consumer is required within fifteen days

[1] The *vendors* of goods, on the other hand, were being taxed under the business tax law.

[2] The *vendors* of utility services were being taxed under the utility tax law.

[3] The *restaurateurs* were liable for a business tax.

[4] No license is required of the seller, or of anyone else for that matter, as a condition of making the sale.

to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (Sec. 2).

Specification of Errors to be Urged.

We contend that the Court of Appeals erred:

(a) In holding that the New York City sales tax as applied to the respondent's sales constituted an unconstitutional burden on interstate commerce.

(b) In holding that the sales which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of *Wiloil Corporation* v. *Pennsylvania* (294 U. S. 169) [1935].

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Summary of Argument.

It will be our purpose in this brief to demonstrate that, from whatever angle the problem is approached, the burden and effect of the tax at bar are the same, whether imposed upon a sale of goods produced or stored within or without the State.

It is our contention that if we are correct in that analysis, the tax must be sustained. For if its effect on interstate commerce is identical with its effect upon local commerce, it cannot violate the Commerce Clause.

We propose to develop this thesis under the following points:

POINT I.

A State taxing statute can be invalidated under the Commerce Clause only if it subjects interstate commerce to such a burden as is tantamount to an interference with the power of Congress to regulate commerce among the several States.

A. Whether or not a State taxing statute interferes with interstate commerce is a question of fact.

B. Without reference to decided cases, it is apparent on the facts that the tax at bar does not interfere with interstate commerce, because its burden is identical whether the goods are delivered from within or without the State.

POINT II.

The tax at bar is indistinguishable on the facts and in practical effect upon commerce from the "use taxes" recently sustained by this Court.

POINT III.

A consideration of the decisions of this Court indicates that in order to maintain equality between interstate and intrastate commerce, the Court has insisted that, while interstate commerce must pay its way, it may not be subjected to a greater burden, or to the danger of a greater burden, than local commerce.

In discussing the cases, the distinction between those relating to regulatory statutes and those relating to purely taxing statutes like that at bar must be borne in mind.

A. While interstate commerce is not exempt from State taxation, discriminatory taxes are clearly invalid.

B. Taxes of such a nature that, if valid, they might with equal right be imposed by several States, merely because interstate commerce is being done, subject interstate commerce to a burden of cumulative taxation not borne by local commerce, and are void.

(1) *The case of Robbins v. Shelby County Taxing District is illustrative of all of the vices found in State statutes invalidated by the Court under the Commerce Clause.*

(2) *A tax imposed upon a local activity, or imposed on an interstate transaction before the interstate movement has commenced or after it has come to rest, is valid because it cannot be imposed in more than one State.*

POINT IV.

The tax at bar is valid under the decisions of this Court because it does not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved.

A. The tax is imposed upon the transfer of possession for use or consumption, a local event which can take place in only a single State.

B. The tax is imposed not upon the seller but upon buyers local to New York who cannot be taxed in any other State.

C. A tax upon a purchaser-consumer is not a tax upon interstate commerce in any event: the purchaser for consumption is not engaged in interstate commerce.

D. The imposition by another State of a tax on the seller upon the same transaction would not impose a burden of multiple taxation "merely because the commerce is being done", since such a tax could also be imposed upon local sellers.

POINT V.

Practical, social and economic considerations require that the tax at bar be sustained.

POINT I:

A State taxing statute can be invalidated under the Commerce Clause only if it subjects interstate commerce to such a burden as is tantamount to an interference with the power of Congress to regulate commerce among the several States.

The taxpayer claims that this tax violates the provision of the Constitution conferring upon Congress the power "to regulate Commerce * * * among the several States * * *." (Art. 1, Sec. 8, Cl. 3.) As this clause does not in terms limit the taxing power of the States, it is obvious that this can be so only if, as a matter of fact, the tax violates its purposes and intent.

The purpose of this clause was largely to prevent the States from favoring domestic industry as against the industries of other States, either by seeking to impose burdensome regulations, or by erecting tariff barriers, or by other forms of regulation or taxation, and thus stifling the growth of a national economy based upon the principle of free trade among the States (*Baldwin* v. *Seelig*, 294 U. S. 511, 523 [1935]). The evils of local tariff barriers, as well as of the attempts of the various States to exact tribute from the goods of otner States while passing through their borders, were very much in the minds of the framers of the Constitution; for they were fully aware of the many examples of those evils presented not only by the acts of the various States under the Articles of Confederation, but by contemporary Europe, and were determined to prevent their continuance in this country. The wisdom of their decision has been overwhelmingly demonstrated by the results.

At the same time, it was not the purpose of the Commerce Clause to interfere with the right of States to impose taxes to meet their own needs. As Alexander Hamilton said in the Federalist, No. XXXII:

> "I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (*with the sole exception of duties on imports and exports*) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution." (Italics ours.)

In *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), the first case to invalidate a State statute under the Commerce Clause, Chief Justice Marshall stated that the clause did not limit the power of the States to tax but only their power to regulate interstate commerce, thus implying that only a tax which was in purpose or effect an attempt to regulate interstate commerce could be held invalid (p. 10):

> "In imposing taxes for State purposes, they are not doing what congress is empowered to do. * * * When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to congress, and is doing the very same thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

It is our contention that these principles form the basis of all the decisions of this Court dealing with State taxes under the Commerce Clause.

Direct attempts to regulate, except when justified under the police power or by the consent of Congress, have, of course, always been outlawed. But here we are dealing not with a regulatory statute but with a taxing statute. Taxing statutes, the effect of which is to place undue burdens upon the introduction of the goods of other States, or which in any other manner interfere with the free flow of interstate commerce, have likewise been condemned under the Commerce Clause. But on the other hand, taxing statutes which do not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if interstate commerce were not involved, have invariably been upheld. The function of the Commerce Clause is to maintain equality between interstate and intrastate commerce. It does not entitle interstate merchants to a "free ride" at the expense of their local competitors; nor does it permit them to carry on their business without paying any part of the expense of the local governments that protect the various phases of their activities.

A. Whether or not a State taxing statute interferes with interstate commerce is a question of fact.

It is evident from a mere statement of this proposition that its application must be based upon factual rather than legal considerations. The Commerce Clause does not in terms limit the taxing power of States. It is only because the Court has found that in certain instances certain statutes as a matter of fact interfered with the power of Congress to regulate commerce that such taxing statutes have been invalidated.

It follows that each statute must be judged upon its own facts. To seek to determine whether or not one taxing statute constitutes an unconstitutional regulation of or interference with interstate commerce by citing formulae alleged to have been laid down by the Court in passing upon another, which may have presented an entirely different state of facts, will inevitably lead to wholly improper and unjustified results. And so this Court has consistently held.

> "No formula has yet been devised by which it can be determined in all cases whether or not such a tax [affecting interstate commerce] is valid, and, applying the repeated declaration of this court, in the cases cited and in many others, * * * the question is inherently a practical one, depending for its decision on the special facts of each case * * *"
>
> *Hump Hairpin Co.* v. *Emmerson*, 258 U. S. 290, 295 (1922).

> "'every case involving the validity of a tax must be decided upon its own facts'; and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."
>
> *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 233 (1916), quoting from *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68 (1913).

The constitutional principle involved is comparable with that developed in the intergovernmental immunity tax cases. There again, the taxes are not expressly prohibited by the Constitution. Their validity or invalidity depends solely upon an analysis of the facts. Is the tax in fact an

interference by one government with the lawful governmental activities of the other?

> "• • • the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on *so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.*" (Italics ours.) *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 481 (1939).

So, here, the only possible basis for implying a constitutional immunity from State tax is that the tax in some way imposes a burden on interstate commerce tantamount to an interference by the State with that commerce. That is a question of fact.

B. Without reference to decided cases, it is apparent on the facts that the tax at bar does not interfere with interstate commerce, because its burden is identical whether the goods are delivered from within or without the State.

On its face, the contention that the tax at bar burdens interstate commerce seems a little far-fetched. The City, in effect, has said to all persons who come to its markets for the purpose of purchasing goods: "You shall pay a tax of 2% of the purchase price on anything (except certain exempted articles) which you buy in the City." The purchaser pays the same tax, whether the coal which he acquires was stored in Pennsylvania or New York. In both cases the sale may have been preceded by an interstate shipment; in both cases the tax is the same; in both cases the incidence of the tax is on a person whose only

part in the transaction was to order, pay for, and obtain possession of the coal in the City of New York from a seller who there offered the coal for sale.

How can such a tax constitute an interference with interstate commerce?

A simple illustration will make it abundantly clear that it cannot. Let us assume that commerce is still being conducted as it used to be not many centuries ago: in the public market place where sellers offer their wares for sale and where all prospective purchasers come in to buy. Obviously, a City would have the power to impose a tax upon all persons who come into this market to buy, based upon the value of their purchases. Into this market come merchants from all over the country offering their wares for sale. The purchaser pays the same tax upon goods produced by his local neighbor as he does upon goods brought from across the continent. Does the imposition of such a tax have any bearing or influence upon him as he goes "shopping" in the market? Is he any more likely to buy the goods of his neighbor than those of the stranger on account of the imposition of such a tax?

Similarly, what difference does it make to the seller? The goods brought in by the "stranger from afar" stand upon exactly the same footing, so far as this tax is concerned, as those of the local merchant. True, he may have been taxed by his home State or even by the various States which he traversed on his way to the market. But, as we shall show more clearly hereafter, under the rulings of this Court he can have been subjected only to such taxes as were either imposed upon local events in the other States, or apportioned according to the proportion of his business done in such States. His local competitor is equally subject to taxes of this kind imposed by the

State of the market place, so that, even from this standpoint, they stand on an equal footing.

Bringing this illustration up to date: What difference does it make whether the merchant brings the actual goods to the market place with him, or whether he sells from samples, delivering his goods from his warehouse, factory or mine, after he has found a purchaser? Again the purchaser, so far as this tax is concerned, will not be influenced by the question of where the warehouse, factory or mine may be located. Even though he may insist upon the product of a particular named factory or mine, it is immaterial whether that factory or mine is located in upstate New York or in Pennsylvania. His sole concern is to get the particular product which he wants, at the lowest price. This tax has no bearing whatever on those considerations.

On the other hand, if the tax at bar is held void, the effect upon commerce becomes immediately apparent. No local merchant will make any sales at all if similar goods are offered by his competitors from other States; for every purchaser will pass him by to seek the vendor whose goods are free from tax.

Such a result is repugnant to every principle of equality between the citizens of the several States inherent in our Federal system.

If exemption from this tax constitutes a subsidy to interstate at the expense of local commerce, it follows that its imposition, resulting inevitably in complete equality, cannot be a burden upon interstate commerce.

POINT II.

The tax at bar is indistinguishable on the facts and in practical effect upon commerce from the "use taxes" recently sustained by this Court.

We have seen that upon a simple basis of factual analysis, without regard to any particular legal theories, it is apparent that the tax at bar does not interfere with or in any way affect the course of interstate commerce. Again before taking up the legal theories involved in this problem, let us compare the factual situation presented by this case with that recently passed upon by this Court in the California use tax cases.

What difference is there between this tax and the California so-called "use taxes" sustained by this Court in the recent cases of *Felt & Tarrant Mfg. Co.* v. *Gallagher* (306 U. S. 62 [1939]), *Southern Pacific Co.* v. *Gallagher* (306 U. S. 167 [1939]), and *Pacific Telephone & Telegraph Co.* v. *Gallagher* (306 U. S. 182 [1939])? In each the tax is imposed upon a purchaser for consumption and in each the tax is measured by the purchase price and payable at the time of the purchase. The following tabular comparison shows the factual identity of the two taxes:

California Tax	New York City Tax
1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.	1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.
2. The tax is a given percentage of the sales price.	2. The tax is a given percentage of the sales price.

California Tax	New York City Tax
3. The tax is paid by the purchaser at the time of the sale.	3. The tax is paid by the purchaser at the time of the sale.
4. The vendor is directed to collect the tax and to state and charge it separately, and is forbidden to absorb the tax, all under pain of criminal penalties.	4. The vendor is directed to collect the tax and to state and charge it separately, and is forbidden to absorb the tax, all under pain of criminal penalties.
5. The tax is collected by the vendor, who files the returns.	5. The tax is collected by the vendor, who files the returns.
6. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.	6. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.
7. The tax law requires the vendor to insure payment of the tax if he fails to make the collections from the taxpayer.	7. The tax law requires the vendor to insure payment of the tax if he fails to make the collections from the taxpayer.

Thus, factually, the two taxes are identical. How, then, can one interfere with interstate commerce, while the other does not?

Our adversaries will no doubt argue that one is called a "use" tax and the other a "sales" tax; that the taxable event in one is described as "the exercise of any right or power * * * incident to the ownership of the property" other than resale (Cal. Laws of 1935, ch. 361, as amended by Laws of 1937, chs. 401, 671 and 683), whereas in the other the taxable event is the "transfer of title or possession or both" for any purpose other than resale.

But this is a difference in words, not a difference in substance. As was recently stated by this Court in *Southern Pacific Co.* v. *Gallagher* (*supra*, p. 177):

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon the choice of the thing taxed." (Italics ours.)

A comparison of the respective statutory definitions of "use" and "sale" makes it evident that "the thing taxed" is identical: the California levy, like the tax at bar, is in fact imposed upon purchases for consumption.

The California law defines "use" as follows:

> "'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property" except sales of property in the regular course of business (Sec. 2[b]).

The New York City definition of "sale" in so far as relevant to the case at bar is as follows:

> "The word 'sale' * * * means any transfer of title or possession or both * * * for a consideration" (Sec. 1[e]).

In *Southern Pacific Co.* v. *Gallagher, supra,* the Court upheld the California tax as applied to the sale and delivery of goods to the purchaser across State lines, even though the goods were consumed in interstate commerce immediately after their receipt by the purchaser. In short, the tax was imposed upon the transfer of the property to the railroad company in California. The New York City sales tax is imposed upon precisely the same event—the transfer of the coal to the purchasers in New York City.

Both the California and the New York taxes are imposed upon the consumer, based upon his acquisition of property for consumption and measured by the purchase

price. The New York tax is as much a "use" tax as the California tax, and the California tax is as much a "sales" tax as the New York tax. Both are taxes on the consumer, both require collection by the vendor, and both are otherwise identical in substance and procedure.

The New York tax, identical in substance with the California tax, can hardly be said to violate the Commerce Clause on the sole ground that the statute describes the tax in different words or by a different name than does the California statute.

That the difference in name (or even, if it be so considered, the difference in substance), between the two statutes is of no legal consequence is evident from the recent decision of this Court in *Graybar Electric Co.* v. *Curry* (308 U. S. * [Nov. 6, 1939], affirming, Ala. , 189 So. 186 [1939]). In that case this Court sustained a tax, collected by the seller from the purchaser of goods ordered and delivered from another State, under a statute denominated the "Alabama Sales Tax Act" and imposed upon the "business of selling at retail". There may be some differences between the exact methods of doing business in that case and this. Nevertheless, in each a tax was imposed upon a purchaser for consumption of goods imported across State lines, and in each the statute was denominated a "sales tax". What then becomes of the alleged distinction between a "use tax" and a "sales tax" imposed upon a purchaser?[1]

As we shall show hereafter, the particular tests applied by the Court in supporting the validity of the "use"

[1] In this connection, see the penetrating paper by Professor Thomas R. Powell of the Harvard Law School, *Business Taxation and Interstate Commerce*, Proc. Nat. Tax Assn., 30th National Conference (1937), pp. 337-359.

taxes are in every respect equally applicable to and equally met by the tax at bar. For the present we are content to rest our argument upon a factual comparison. Upon that analysis it is clear that *this* taxpayer could be compelled to pay *this* tax upon *these very transactions*, had they taken place in California, under the California use tax statute. How can the imposition of the tax become an unconstitutional burden on interstate commerce, when imposed in New York City under the New York City sales tax law?

It is true that if the New York tax be held void, interstate commerce will flow more freely in New York than in California, for obviously every New York purchaser will seek to buy goods only from those vendors who are able to store their goods in another State and make shipment across State lines. If it be the purpose of the Commerce Clause to subsidize interstate commerce to the point of destroying local business, then indeed this tax should be held invalid. But certain it is that if it be sustained, interstate commerce will be no worse off in New York than it is in California. No New Yorker will favor interstate shipments less because the tax is called a "sales" tax, and is described (in a statute which he has never seen) as being imposed upon his acquisition of the property for consumption, than he would if the tax were described as a "use" tax and imposed upon his receipt and retention of the property for consumption.

It takes more than dialectics to change the course of interstate commerce.

POINT III.

A consideration of the decisions of this Court indicates that in order to maintain equality between interstate and intrastate commerce, the Court has insisted that, while interstate commerce must pay its way, it may not be subjected to a greater burden, or to the danger of a greater burden, than local commerce.

In the previous Point we sought to demonstrate that the tax at bar was indistinguishable upon the facts from the "use" tax cases recently sustained by this Court. If we are correct in that contention, there is no need for further discussion.

If it be thought that the tax involved in this case is distinguishable, then it becomes necessary to consider the tax as an original proposition and discuss it from the standpoint of basic principles. For we know of no decided cases other than the "use" tax and *Graybar* cases which deal with a tax imposed by his own State upon a purchaser of goods for consumption, measured by the sales price of the goods. Let us turn to the cases, and determine what basic principles applicable to the facts at bar have been laid down by the Court.

In discussing the cases, the distinction between those relating to regulatory statutes and those relating to purely taxing statutes like that at bar must be borne in mind.

As we have already stated, the Commerce Clause itself does not in terms limit the taxing power of the States. It

merely confers upon Congress the power to regulate interstate commerce. Obviously, a State statute seeking in terms to regulate that commerce would be unconstitutional.

For example, a statute compelling a foreign corporation seeking to do an exclusively interstate business to submit a financial statement and a list of its stockholders and officers before its application for a license to do business in the State would be considered, has been held to be an unconstitutional regulation of commerce (*International Textbook Co.* v. *Pigg*, 217 U. S. 91 [1910]). Where, as in that case, the fee required for obtaining such a license was imposed not for the general purposes of obtaining revenue, but rather in order to defray the expenses of filing and regulation, the problem is a fairly simple one. The power to grant or withhold a franchise or license imports the power to impose terms and conditions upon its exercise: that is to say, "to regulate." As a State cannot regulate interstate commerce (except within a limited field, not here relevant) it cannot require a franchise or permit for the right to engage in it.

But a more complicated situation arises when the fee for obtaining the franchise is substantial, and in excess of the amount required for merely carrying out the purposes of administering the franchise statute itself. For then the exaction becomes in part a revenue measure, or tax, and we are confronted with two separate problems in determining the validity of the statute: the pure question of regulation, and the question of whether or not the tax constitutes a burden upon interstate commerce. It is of great importance to bear this distinction in mind whenever cases involving a corporate franchise or license tax imposed upon persons or corporations doing an exclusively interstate business are considered.

In considering whether or not a taxing statute having no regulatory features violates the Commerce Clause, we believe that the underlying concept is that equality between interstate and intrastate commerce must be maintained. In applying this concept, two cardinal principles, which were laid down in the earliest of the Commerce Clause cases, underlie all the decisions of this Court:

> (1) No State may impose a tax which subjects interstate commerce to a greater burden, or to the danger of a greater burden, than would result if interstate commerce were not involved.
>
> (2) Interstate commerce must pay its way.

In applying these principles the Court has found only two basic types of taxes which offend the Commerce Clause: (a) Taxes actually discriminating against interstate commerce, and (b) Taxes which are in effect discriminatory because they subject interstate commerce to the danger of cumulative tax burdens not borne by intrastate commerce, merely because the commerce is being done.

In the following pages we propose to trace in broad outline the development of the law on this subject, touching on some of the milestones in order to indicate that, at least on the basis of factual analysis, the Court has never varied from these principles.

A. While interstate commerce is not exempt from State taxation, discriminatory taxes are clearly invalid.

Statutes which apply only to products sold in interstate commerce are obviously invalid because they are discriminatory. The earliest taxes invalidated by the Court involved just such discrimination (*Brown* v. *Maryland*,

12 Wheat. 419 [1827]; *Ward* v. *Maryland,* 12 Wall. 418 [1870]; *Welton* v. *Missouri,* 91 U. S. 275 [1875]; *Cook* v. *Pennsylvania,* 97 U. S. 566 [1878]; *Webber* v. *Virginia,* 103 U. S. 344 [1880]; *Walling* v. *Michigan,* 116 U. S. 446 [1886]).

Such cases, of course, have no application whatever to the case at bar in which the statute applies alike to goods sold from local warehouses and to goods shipped across State lines.

That a tax which does not discriminate against interstate commerce and does not subject the foreign merchant to greater burdens of taxation, or to the possibility of greater burdens than are borne by the local merchant, will be sustained, was recognized by the Court in one of the first commerce cases it considered: *Woodruff* v. *Parham* (8 Wall. 123 [1868]).

In that case this Court sustained a local law of the City of Mobile, Alabama, imposing a tax, *inter alia,* upon all sales at auction and sales of merchandise within the City. Woodruff, an auctioneer, sold goods, some of which were products of States other than Alabama, and claimed that he was not required to pay a tax on such sales. The Court, after overruling the dictum in *Brown* v. *Maryland, supra,* that imports from other States were completely immune, said (pp. 139-140):

> "We are satisfied that the question, as a distinct proposition necessary to be decided, is before the court now for the first time.
>
> But, we may be asked, is there no limit to the power of the States to tax the produce of their sister States brought within their borders? and can they so tax them as to drive them out or altogether prevent their introduction or their transit over their territory?

> The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void."

In the very next case decided by it, *Hinson* v. *Lott* (8 Wall. 148 [1868]), the Supreme Court applied the principle so announced. A taxpayer there complained of a State law taxing the introduction of liquors into the State for purposes of sale. The Court said that such a statute standing by itself would undoubtedly violate the Constitution, but pointed out that the statute also imposed a tax at exactly the same rate upon all liquors manufactured within the State. The Court held, therefore, that inasmuch as the act merely subjected imported articles "*to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States.*" (Italics ours.)

The principle that interstate commerce must pay its way is likewise well expressed in *Woodruff* v. *Parham*, *supra*. The Court there describes the injustice that would result if immunity from State taxation should apply to all

interstate transactions, whether or not it placed a burden upon them (p. 137):

> "The merchant at Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all state, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens."

Thus, since the earliest decisions on this subject, the Court has recognized that the primary function of the Commerce Clause, in so far as its effect on taxing statutes is concerned, is to maintain equality between local merchants and the merchants of other States.

B. Taxes of such a nature that, if valid, they might with equal right be imposed by several States, merely because interstate commerce is being done, subject interstate commerce to a burden of cumulative taxation not borne by local commerce, and are void.

The principle laid down in *Woodruff* v. *Parham*, *supra*, seems both logical and simple. A local law is unobjectionable even though it be imposed on goods imported from another State, if it does not place any greater burden upon the sale of those goods than is placed upon the sale of

similar goods delivered from a point within the State. Goods brought from Pennsylvania should stand in neither a better nor a worse position when they reach the New York market than goods brought from "upstate".

At first blush it would appear that the only question involved is whether a statute by its terms discriminates against interstate commerce. But unfortunately the practical application of the rule is not as simple as that. Thus, in one of the earliest cases in which this Court held a State taxing statute invalid as violative of the Commerce Clause, the tax, on its face, was apparently non-discriminatory.

In *Case of the State Freight Tax* (15 Wall. 232 [1872]), the Court held invalid a statute of the State of Pennsylvania which imposed a selective tax at a flat rate of so much per ton upon all freight transported in the State. The tax in terms applied alike to interstate and intrastate shipments.

But it was not apportioned to the mileage over which the freight was carried. Thus, the carrier had to pay the same tax whether the transportation took place wholly within the State or between Pennsylvania and points in other States. If Pennsylvania could impose such a tax, every State through which the freight was transported might, with equal right, impose a similar tax upon the same freight. In spite of its non-discriminatory appearance, the Court held the tax invalid, saying (p. 280):

> "* * * for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed * * *."

This was the first of a series of cases resulting from a growing local antagonism towards the rapid expansion of the "vested interests" as represented by the railroad, telegraph, and express companies. Repeated attempts were made by various States either to hamper their development or to exact tribute from them for the benefit of the local taxpayers. But the Court, relying upon the Commerce Clause, was astute to prevent all such attempts (*Western Union Tel. Co.* v. *Texas*, 105 U. S. 460 [1881]; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34 [1886]; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 [1887]; *Leloup* v. *Port of Mobile*, 127 U. S. 640 [1888]; *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U. S. 114 [1890]; *McCall* v. *California*, 136 U. S. 104 [1890]).

Most of these taxes were flat taxes or license fees, such as that invalidated in the *Case of the State Freight Tax*, *supra*, imposed directly upon the conduct of interstate transportation or communication. Others were unapportioned gross receipts taxes selectively imposed on transportation or communication companies.

Because none of these taxes was apportioned to the mileage or business done in the State, they would, if sustained, subject interstate business to the danger of similar taxation by other States. Local businesses, on the other hand, could be subjected to only one tax.

Thus far under this subheading we have discussed cases dealing with transportation or communication companies. The danger of multiple taxation is perhaps most readily apparent in cases of that type. The activity taxed, being of an ambulatory nature necessarily reaching into several States, it is inevitable that, without the protection of the Commerce Clause, it would be subject to cumulative exactions by the several States.

At about the same period of expansion in the industrial and commercial life of the country which resulted in these local attacks upon transportation and communication companies, there arose a similar local antagonism towards "foreign" travelling salesmen, or drummers seeking to sell goods produced in other States by house to house solicitation. The natural instinct to protect the local merchants asserted itself. The legislators showed great ingenuity in seeking to devise taxing methods which would restrict these activities without appearing expressly to discriminate against them. Nevertheless, wherever the Court found from a factual analysis, that discrimination was either the true purpose or the practical result of the statute, the tax was invalidated.

For example, there appears to have been a growing business, originating in the northern States, of sending drummers to sell pictures and picture frames to the housewives in certain southern States. Various statutes to penalize these sales were thrown out, either because it appeared on the face of the statute that it was directed at the foreign goods, or because the tax was so imposed as to fall as a practical matter more heavily upon those goods than upon those of local merchants (*Brennan* v. *Titusville*, 153 U. S. 289 [1894]; *Caldwell* v. *North Carolina*, 187 U. S. 622 [1903]; *Dozier* v. *Alabama*, 218 U. S. 124 [1910]; *Davis* v. *Virginia*, 236 U. S. 697 [1915]).

So, also, the Court invalidated various hostile tax statutes aimed at other products of non-resident manufacturers (*Welton* v. *Missouri*, 91 U. S. 275 [1875], and *Norfolk & Western Ry. Co.* v. *Sims*, 191 U. S. 441 [1903], sewing machines; *Asher* v. *Texas*, 128 U. S. 129 [1888], and *Stockard* v. *Morgan*, 185 U. S. 27 [1902], stationery; *Crenshaw* v. *Arkansas*, 227 U. S. 389 [1913], ranges; *Rogers* v. *Arkansas*, 227 U. S. 401 [1913], buggies).

Quite apart from the apparent intent of the statutes discussed in these cases to discriminate against interstate commerce, they were subject to the objection that they were in fact direct attempts to regulate. For most of the cases dealt with license taxes imposed upon all persons desiring to do business within the State. As we saw at the outset of this discussion, the principles involved in cases of that kind are different from the principles presented by pure taxing statutes.

Another group of cases involving these same mixed considerations is presented by the cases outlawing attempts by States to require foreign corporations doing an exclusively interstate business to pay a corporate franchise tax.

The rationale of these cases is well stated in *Crutcher* v. *Kentucky* (141 U. S. 47, 57 [1891]):

> "To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States * * *".

The States have no power to impose conditions upon the doing of an exclusively interstate business by a foreign corporation (*Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1 [1910]; *Pullman Co.* v. *Kansas*, 216 U. S. 56 [1910]). By the same token, corporate franchise taxes, which contain both tax and regulatory features, when imposed upon foreign corporations carrying on within the State an exclusively interstate business, are invalid even though apportioned to the receipts from business done in the State or to the capital employed (*Cheney Bros. Co.* v. *Massachusetts*, 246 U. S. 147 [1918]; *Alpha Cement Co.* v. *Massa-*

chusetts, 268 U. S. 203 [1925]; *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555 [1925]; *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 [1937]).[1]

On the other hand, a taxing statute imposed upon a foreign person or corporation doing an exclusively interstate business may be perfectly valid, if properly apportioned, where it is not combined with any regulatory features (*United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321 [1918]; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 [1920]; *Bass, Ratcliff & Gretton* v. *State Tax Commission*, 266 U. S. 271 [1924]; *Atlantic Coast Line R. R. Co.* v. *Daughton*, 262 U. S. 412 [1923]).

The statute at bar is a pure taxing statute, free from all regulatory features found in franchise or license tax cases. In applying decisions of the Court to such a statute, we must beware lest we be misled by the language used by the Court in cases containing mixed features.

(1) *The case of Robbins* v. *Shelby County Taxing District is illustrative of all of the vices found in State statutes invalidated by the Court under the Commerce Clause.*

A leading case of this general type is *Robbins* v. *Shelby County Taxing District* (120 U. S. 489 [1887]). That case

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[1] The Court's view of the invalidity of corporate franchise taxes as applied to foreign corporations doing an exclusively interstate business was not reached without dissent. See the dissenting opinion of Mr. Justice Holmes in *Western Union Tel. Co.* v. *Kansas*, *supra*, concurred in by Fuller, C.J., and McKenna, J., and the dissents in *Pullman Co.* v. *Kansas*, *supra*, by the same Justices. Justice Brandeis dissented without opinion in *Alpha Cement Co.* v. *Massachusetts*, *supra*. For a criticism of the corporate franchise decisions, see T. R. Powell, *Contemporary Commerce Clause Controversies over State Taxation*, 76 U. of Pa. L. Rev. 773, 958, 962 (1928); Harding, Double Taxation of Property and Income (1933), 252 *et seq.* Compare *Stone* v. *Interstate Natural Gas Co.*, 103 F. (2d) 544, affirmed, 308 U. S. (Dec. 11, 1939).

typifies a statute which contains practically all the vices which have been found by this Court in outlawing various State taxing statutes.

As is apparent from a careful analysis of the facts, the tax imposed was (a) in fact discriminatory; (b) it was in the nature of an attempt by the State to regulate interstate commerce; and (c) it subjected that commerce to the danger of multiple taxation.

(a) The statute in that case imposed a license fee of $10 a week or $25 a month upon drummers not having a regular place of business within the State. While in terms applying equally to all such drummers, as a matter of obvious fact every drummer representing a local seller would have a fixed place of business within the State. The practical effect of the statute was the same as if it had been in terms directed solely at drummers selling the products of other States. As was well recognized by the Court, it was but a thinly disguised attempt to discriminate against interstate commerce (p. 498):

> "* * * They [the merchants of other states] can only sell goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and *the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects.* This kind of taxation is usually imposed at the instance and

solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it." (Italics ours.)

(b) Furthermore, it is apparent that the statute was in effect an attempt by the State to regulate interstate commerce. It made it a misdemeanor for a drummer to operate in the State without obtaining a license, and provided further that the license, even though the monthly or weekly fee were paid, would be valid for a period of only three months. Presumably, this meant that the State reserved the right to refuse to renew the license. If it could refuse to grant a license to a foreign drummer at all, it could grant it upon conditions; that is to say, it could regulate his business of negotiating sales in interstate commerce.

(c) Finally, the tax in the *Robbins* case resembles that passed upon in *Case of the State Freight Tax, supra.* As we pointed out in discussing that case, the danger of multiple taxation is peculiarly apparent in transportation and communication cases, because the activity taxed is essentially ambulatory and of necessity must cross State lines. But the business of sending out salesmen to sell the product of one State throughout the markets of the

country is in fact no less ambulatory in character, and therefore no less subject to the danger of multiple taxation.

As the Court pointed out in comparing the position of the foreign seller and the local merchant: "they [the local merchants] are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside * * *" (p. 498). That is to say, the foreign merchant pays a tax at his local place of business in addition to the license tax here in issue; whereas the local merchant pays only the one tax upon his local place of business.

The effect of the tax would be the same as that in *Case of the State Freight Tax:* a flat rate unapportioned to the amount of the business done, might be imposed by every State touched by his business of seeking to sell his goods in interstate commerce. This, we think, is the explanation of the statement so often quoted from the opinion in the *Robbins* case, reading as follows (p. 497):

> "* * * Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of *The State Freight Tax*, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

That the Court did not intend to lay down a general rule that a local tax could not be imposed at all with respect to interstate sales is evident from the case of *Ficklen* v. *Shelby County Taxing District* (145 U. S. 1

[1892]), decided five years after the *Robbins* decision. There the Court upheld a statute imposing a tax upon brokers measured by their commissions earned in negotiating exclusively interstate sales.

The distinction between the *Ficklen* and *Robbins* cases is that in the latter, as a matter of factual analysis, the tax placed a hurdle in the path of the foreign vendor seeking to sell his goods within the State, by subjecting him to a multiple tax burden not borne by his local competitor, whereas in the *Ficklen* case the tax was imposed upon a local business man measured by his gross receipts from the business carried on by him, notwithstanding that those receipts constituted exclusively commissions earned in negotiating interstate sales. He could not be taxed on those commissions in another State. It is obvious from a factual analysis that the burden of this tax was the same whether the sales upon which the commissions were earned by the local broker were sales in interstate commerce or strictly local sales.[1]

(2) *A tax imposed upon a local activity, or imposed on an interstate transaction before the interstate movement has commenced or after it has come to rest, is valid because it cannot be imposed in more than one State.*

This Court has always sustained taxes imposed upon any local activity as long as it could in some way be separated from the purely ambulatory activity of transportation, communication, or interstate selling (*American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 [1919]; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250

[1] See illuminating discussion of the *Robbins* case by William B. Lockhart, in *The Sales Tax in Interstate Commerce*, 52 Harv. L. Rev. 617 (1939).

[1938]; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604 [1938]; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 [1932]). The rationale of these decisions is that the tax is imposed either before the commerce has begun or after it has come to an end.

It is sometimes said that this rationale constitutes one of the basic tests in determining whether or not a tax is valid. We submit that a consideration of the facts in these cases shows that the moment at which interstate commerce begins or ends is important not for its own sake so much as because it forms a convenient test for determining whether or not the tax is of such a nature that it can be imposed in every State which the commerce touches. This again is particularly well illustrated in the case of taxes on transportation and communication across State lines. If an unapportioned tax is levied on an activity which is exclusively related to interstate movement, there is nothing to prevent it, if it be valid at all, from being imposed wherever that activity takes place. There is nothing to tie the tax down to any particular locality. So also in cases dealing with selling in interstate commerce: If the tax is imposed upon phases of the transaction exclusively related to the interstate activity, there is nothing to prevent it, if it be valid at all, from being imposed wherever that activity takes place. But when the tax is imposed in whole or in part upon some phase of the activity or transaction which is local in nature, so that it can take place only in a single State, the tax has always been sustained. See *Ficklen* v. *Shelby County Taxing District*, *supra*, and the use tax cases, *supra*.

In other words, the ultimate question to be determined is not whether the commerce has commenced or ended, but

whether the tax is one which can be imposed in more than one State.

The doctrine of multiple taxation, of course, finds its clearest and most effective expression in the recent cases, such as *Western Live Stock* v. *Bureau of Revenue, supra, Coverdale* v. *Arkansas-Louisiana Pipe Line Co., supra,* and *Southern Pacific Co.* v. *Gallagher, supra,* on the one hand, where the tax was held valid because, being attached to a local activity, it could be imposed in only one State; and *Adams Mfg. Co.* v. *Storen* (304 U. S. 307 [1938]) and *Gwin, White & Prince, Inc.* v. *Henneford* (305 U. S. 434 [1939]), on the other, where the tax was held void because, being imposed solely on an ambulatory phase of the activity it could, if valid, be imposed with equal right by every State which the commerce touched.

These cases have been so recently decided, however, that we think it would be superfluous to burden the Court with any extensive discussion of their facts or meaning. Suffice it to say that in our judgment they have effectively cleared away any doubts as to the true basis upon which State taxing statutes will be invalidated, which may have grown out of the various confusing factual situations heretofore discussed, and have reiterated and restated with clarity and precision the underlying doctrine for which we here contend: that a taxing statute is valid if it does not in fact discriminate against interstate commerce and does not in substance subject it to the danger of multiple taxation.

POINT IV.

The tax at bar is valid under the decisions of this Court because it does not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved.

We think we have shown that, in applying the ultimate test of equality between interstate and local commerce, the Court has found only two types of taxes which, as a matter of factual analysis, violate its principles: (1) Discriminatory taxes, and (2), Taxes of such a nature that, if valid, they could be imposed with equal right in several States, merely because interstate commerce is being done.

We assume that our adversaries will agree that the tax at bar does not fall within the first category. It is not discriminatory in its terms; it is imposed alike upon all goods purchased within the State, wherever they may have been located at the time the sale was negotiated. The goods of the foreign merchant stand upon an equal footing in the markets of New York with the goods of the local merchant. The taxpayer pays the same tax, whichever goods he buys.

But no doubt our adversaries will advance the argument that the tax is an unapportioned tax upon interstate commerce, which can be imposed with equal right in every State which the commerce touches; in other words, they will invoke the rule of multiple taxation.

As we have further observed in discussing the decided cases, the rule of multiple taxation can be stated in a number of different ways. The Court, in applying it, has

frequently disposed of a case by merely showing that the tax was "not imposed on interstate commerce"; or that it was imposed upon a "taxable moment" separate from the commerce; or that it was imposed before the commerce had commenced or after the goods had "come to rest"; or that it was imposed upon a "local activity". In our view these statements do not represent separate or independent concepts or rules under the Commerce Clause. They present short cuts to a factual determination of whether or not multiple taxation may result.

Let us consider the tax at bar from the standpoint of these short cuts.

A. The tax is imposed upon the transfer of possession for use or consumption, a local event which can take place in only a single State.

The tax here at bar is not such a tax as might with equal right be imposed by any other State. The taxable event is the transfer of the goods in New York, for use and consumption. Under the Sales Tax Law, only local transfers are taxed and no tax is imposed in any case where delivery takes place outside the City (Sales Tax Regulations, Art. 94). The State enabling act forbids any tax unless the transaction taxed both originated and was consummated within the City of New York (New York Laws of 1934, ch. 873, sec. 1). By amending the remittitur to make clear that all State questions are eliminated (R. 158), the Court of Appeals has in effect held that the tax at bar as applied to this respondent fully satisfies these statutory limitations. Thus, as applied at bar, the tax is imposed upon a transaction both originating and consummated in New York City (See *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169, 174 [1934]).

Whether or not the transfer of the goods for consumption is an integral part of an interstate sale, it is essentially a local event (*Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 [1932]). Consequently it is not an event which can be taxed in any other State (*Coverdale* v. *Arkansas-Louisiana Pipe Line Co., supra; Ficklen* v. *Shelby County Taxing District, supra*).

From the standpoint of multiple taxation the tax is identical with one imposed before interstate commerce has commenced, such as a tax on manufacturing (*American Mfg. Co.* v. *St. Louis, supra*), or upon storage or the withdrawal from storage (*Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249 [1933]). Similarly it is identical with taxes imposed immediately after the interstate commerce has terminated (*Minnesota* v. *Blasius*, 290 U. S. 1 [1933]; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 [1939]).

This is the rationale relied upon in supporting taxes upon an identical state of facts in the recent "use tax" cases. As we have shown in Point II, *supra*, every argument made in support of those taxes is equally applicable to the tax at bar.

B. The tax is imposed not upon the seller but upon buyers local to New York who cannot be taxed in any other State.

Quite apart from the local nature of the taxable event, there is another reason why this tax cannot be imposed in more than one State: The taxpayer is not the seller, but the local purchaser. He is subject to tax only if he obtains

possession of the goods in the City of New York, for use or consumption.

It is evident that no State other than the consumer's State has any power to impose any tax upon the purchaser for consumption. There are only two States which have any possible basis for taxing a retail purchase and sale in any event—the State of the buyer and the State of the seller. In the typical situation the purchaser is a non-resident of the vendor's State, is not engaged in business in the vendor's State, and does not come into the vendor's State either to take delivery or possession or for any other purpose. He carries on business in his own State, where the order is solicited, the goods are received and title is transferred. It is apparent, therefore, that the seller's State has no jurisdiction to tax the purchaser upon these sales. Because of this fact no State, so far as we know, has even attempted to impose a sales tax upon purchasers in other States. In New York City both the State enabling act authorizing the tax and the taxing law itself expressly forbid taxing such transactions (Laws of 1934, ch. 873, as amended; *Matter of Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148 [1938]).

The power of a State to tax persons or corporations is based upon three considerations: The person taxed may be a local resident, in which case he may be taxed upon his income wherever its source, and upon his property within the State (*Lawrence* v. *State Tax Commission*, 286 U. S. 276 [1932]). Or, even though a non-resident, he may be taxed upon any property which he has within the State (*New Orleans* v. *Stempel*, 175 U. S. 309 [1899]; *Minnesota* v. *Blasius*, *supra*). Finally, a non-resident may be taxed upon any local activity carried on

within the State (*Shaffer* v. *Carter*, 252 U. S. 37 [1920]; *Yale & Towne Mfg. Co.* v. *Travis*, 252 U. S. 60 [1920]). Unless one of these factual situations exists, a State has no power to tax (*Conn. General Life Insurance Co.* v. *Johnson*, 303 U. S. 77 [1938]). Upon no basis, therefore, does the vendor's State have jurisdiction to tax the purchaser (*Curry* v. *McCanless*, 307 U. S. 357 [1939]).

If it be argued that a purchaser who obtained the goods for use or consumption in another State could be taxed upon such use or consumption in such other State, the answer is that our tax is imposed only where delivery is made within the State. If the goods are delivered at the place of consumption in another State, there is no tax. Of course if, after having acquired possession in this State, the purchaser later moves to another State and takes the goods with him, he cannot complain if he is again taxed upon the possession of the same goods. The purchaser in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, *supra*, might decide to move his business to another State and take his comptometers with him. Nothing would prevent the other State from imposing another use or property tax upon him there. Such multiplication of taxes bears no relation whatever to the interstate nature of the sale. It would arise equally if the taxpayer had purchased the goods from a local seller, and later took them into another State. The Constitution is not violated because the cumulative burden, if any, is not imposed "merely because interstate commerce is being done" (*Western Live Stock* v. *Bureau of Revenue*, *supra*).

C. A tax upon a purchaser-consumer is not a tax upon interstate commerce in any event: the purchaser for consumption is not engaged in interstate commerce.

It is a little difficult to see any relationship between the statute here involved and those in which the doctrine of multiple taxation was relied upon as the basis of outlawing the tax. In all of those cases the taxpayer was one engaged in making a living either from selling goods in interstate commerce (*Adams Mfg. Co.* v. *Storen, supra; Gwin, White & Prince, Inc.* v. *Henneford, supra*), or from carrying on interstate transportation or communication (*Case of the State Freight Tax, supra; Fisher's Blend Station* v. *State Tax Comm.*, 297 U. S. 650 [1936]). So, also, the flat license taxes outlawed as violating the Commerce Clause were imposed upon persons engaged in the business of making a profit either out of negotiating sales in interstate commerce (*Robbins* v. *Shelby County Taxing District, supra*), or of carrying on interstate transportation or communication (*Pickard* v. *Pullman Southern Car Co., supra; Leloup* v. *Port of Mobile, supra*).

But in the present case the taxpayer, so far as the incidence of this tax is concerned, is not engaged in the business of making a profit out of interstate commerce at all. He is merely a purchaser for consumption. Is the housewife who goes to the nearest market to buy her household supplies engaged in commerce or business? Or the customer who buys a meal at a restaurant? True, many taxpayers such, for example, as the respondent in the companion case of *McGoldrick* v. *Compagnie Generale Transatlantique*, intend to consume the goods which they purchase in their business, but this does not mean that the act of buying constitutes engaging in business.

The word "commerce", according to Webster's New International Dictionary, means: "Business intercourse; esp., the exchange or buying and selling of commodities on a large scale between different places or communities; extended trade or traffic." The synonyms given are "trade" and "traffic." In other words, commerce means engaging in certain kinds of business. But the tax at bar is not intended to be imposed upon business but upon purchasing for consumption. A purchaser for resale is engaged in business; but he is expressly exempted from this tax. He would be subject to a gross business tax or to an income tax or to a sales tax imposed upon him as the seller on the resale of his goods; but not upon his purchases.

As we have seen throughout the foregoing discussion, any tax upon one engaged in the business of trading for profit must be carefully examined to see that it does not impose a burden upon so much of his business as may be interstate. But no such dangers enter into the consideration of a tax upon a purchaser for consumption, not only because his is a local activity and he himself a local individual, but because he is not engaged in commerce at all. The Commerce Clause has no application to such a tax as that at bar.

D. The imposition by another State of a tax on the seller upon the same transaction would not impose a burden of multiple taxation "merely because the commerce is being done", since such a tax could also be imposed upon local sellers.

As we have seen, the precise tax involved in this litigation cannot be imposed by more than one State. It is

imposed upon a local event which cannot take place in another State, and furthermore, it is imposed upon a taxpayer who himself is local to the State of New York.

If it be said that the vice of the tax is that it might be imposed upon the goods in another State, or upon the sale of the goods by the seller in another State, and that, therefore, a succession of taxes by different States upon the same goods might accumulate, the answer is that such cumulative taxation has never been held unconstitutional. Thus, a tax upon the manufacture or storage or release from storage of goods in another State is valid because that tax is based upon an activity local to such other State (*American Mfg. Co.* v. *St. Louis, supra; Gregg Dyeing Co.* v. *Query, supra; Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249 [1933]). The reason is that such multiplication of taxes does not arise merely because interstate commerce is being done. Interstate commerce is not subjected to a greater burden than local commerce.

Let us consider taxes upon the seller. That an *unapportioned* gross receipts tax upon the seller cannot be imposed in other States, has been already decided by this Court (*Adams Mfg. Co.* v. *Storen, supra; Gwin, White & Prince, Inc.* v. *Henneford, supra*).

An *apportioned* gross receipts tax upon the seller would not violate the principle of multiple taxation even though the present tax is sustained. Like the manufacturing and storage taxes, it would not subject interstate commerce to a burden "not imposed on local commerce" "merely because interstate commerce is being done" (*Western Live Stock* v. *Bureau of Revenue, supra*). For the City of New York itself might equally well and, in fact, does, impose just such a tax upon *local* sellers. In addition to the sales tax, as we have shown at page 5,

supra, the City of New York also imposes a gross business tax under which local sellers pay a tax based upon their total gross receipts, and interstate sellers pay an apportioned tax upon their receipts from interstate sales.[1]

As was pointed out by the New York Court of Appeals in discussing the relationship between the sales tax and the gross receipts tax as applied to utility companies in *Matter of Merchants Refrigerating Co.* v. *Taylor* (275 N. Y. 113, 124 [1937]):

> "Appellant contends that it is twice taxed on its gross receipts, once by the sales tax, and once by the utility tax. As pointed out by the City, the sales tax falls upon the purchaser while the utility tax falls upon the utility itself."[2]

Let us consider an illustration in order to make this proposition perfectly clear: Let us assume that the seller involved in this litigation has a place of business in New York and is subject to the New York apportioned gross receipts tax. Let us assume also that the State of origin, Pennsylvania, imposes a similar apportioned gross receipts tax on the seller. Presumably, adding the two proportions, the seller will pay one tax on the full amount of the receipts from the sale, apportioned between the two States. Quite apart from that, as a totally separate tax, the purchaser will pay a full tax on the purchase of the goods. Thus the Pennsylvania seller is in exactly the same position as the local seller, who pays the New York gross receipts tax on the *full* amount of his local sales, while the

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[1] Under the New York City business tax on gross receipts, interstate vendors pay only an apportioned tax determined by use of an allocation formula. New York City Business Tax Regulations, Art. 238.

[2] No more than one tax on the gross receipts of a person selling goods or services may be imposed under the State enabling act. Laws of 1934, ch. 873, sec. 1.

purchaser of those goods similarly pays a tax on the same transaction. "Equality is the theme that runs through" the statutes. "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership [or sale] than the dweller within the gates." (*Henneford v. Silas Mason Co.*, 300 U. S. 577, 584 [1937].)

POINT V.

Practical, social and economic considerations require that the tax at bar be sustained.

We have already shown that, tested by the basic principle underlying the Commerce Clause, the tax at bar is valid. This result is fortified by a consideration of the practical, social and economic results of such a decision.

The tax is levied upon and borne by the purchaser for consumption. A democratic tax system requires that taxes be paid by the electorate whose representatives impose it. The tax at bar was enacted by the elected representatives of the local buyers and is thus based upon democratic principles.

A tax on purchases of goods for consumption imposed by the purchaser's State, applied equally to goods bought from local merchants and from merchants filling orders from across State lines, prevents discrimination against local business. If this tax should be invalidated, merchants who keep their goods in warehouses across the Hudson River could put up a sign stating "BUY HERE AND AVOID THE SALES TAX." Such discrimination against local merchants is repugnant to every principle of equality between citizens and States which it was the purpose of the Constitution to establish and protect. If we are to

insure free trade between the States, we must not only protect interstate commerce from interference by local taxation but we must protect local commerce from any discrimination in favor of interstate commerce. The tax at bar "accommodate[s] itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business." (*Western Live Stock* v. *Bureau of Revenue, supra*, 303 U. S. at p. 258.)

The protection and benefits which the buyer's State confers upon sellers, purchasers and sales to local purchasers are a complete economic justification for sustaining the tax. In soliciting the order, maintaining a local office and delivering the goods to the local purchaser, the seller receives the protection of the police, fire, sanitation and other departments of the City of New York. In enforcing payment, the seller makes use of the courts of this State. The purchaser is customarily either a resident of the State, protected by all its laws, and the beneficiary of its governmental services, or is engaged in business in the State and is similarly protected and benefited. A State conferring such benefits both upon the seller and the buyer has the strongest claim to imposing the tax at bar.

If this tax is held invalid on the basis of such artificial and uneconomic devices as the acceptance of orders outside the State, or contractual "requirements" that the goods be delivered from outside the State, etc. wholesale tax avoidance will be encouraged and induced. (See, for example, the elaborate paraphernalia employed by Felt & Tarrant Manufacturing Co., the respondent in one of the four companion cases here involved, which is obviously designed to avoid local taxes.) The elimination of tax

avoidance is of the greatest importance in accomplishing the purpose of placing interstate and intrastate commerce on a level of equality.

Finally, the adjustment of the revenue needs of the various States requires that consumers' sales taxes, paid by the purchaser and imposed by his State, be upheld. This Court has already sustained taxes upon manufacturing, mining and severance, measured by gross receipts from interstate sales, which provide the producing States with an important source of their revenue. The fiscal crisis which the States and localities have faced in recent years, in view of heavy relief rolls, is too serious and widespread to require discussion. To the manufacturing and producing States, the decisions point the way to gross receipts taxes. The non-producing States face a far more serious problem. During the depression an increasing number of sales taxes have been enacted. If this Court should invalidate the tax at bar, States and localities having similar taxes would be deprived of a similarly needed source of revenue as far as interstate business is concerned. New York City, which is both a great manufacturing center and the largest purchasing market in the country, has been forced to impose both a gross receipts tax on business and a consumers' sales tax in order to carry out its notable program of unemployment relief.

Conclusion.

It has been our purpose in this brief to demonstrate that, from whatever angle the problem is approached, the burden and effect of the tax at bar are the same, whether imposed upon a sale of goods produced or stored within or without the State.

It is our contention that if we are correct in that analysis, the tax must be sustained. For if its effect on interstate commerce is identical with its effect upon local commerce, it cannot violate the Commerce Clause.

The final order and judgment should be reversed and petitioner's determination confirmed.

December 18, 1939.

Respectfully submitted,

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